

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1007

To be argued by  
GEORGE E. WILSON

*B  
P  
S*

---

---

**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

**Docket No. 76-1007**

---

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

GERALD DEVINS,

*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

---

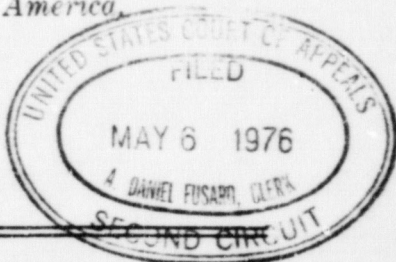
**BRIEF FOR THE UNITED STATES OF AMERICA**

---

---

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

GEORGE E. WILSON,  
LAWRENCE B. PEDOWITZ,  
*Assistant United States Attorneys,  
Of Counsel.*



## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Statement of Facts .....	2
The Government's Case .....	2
A. Synopsis .....	2
B. The proof at trial .....	4
The Defense Case .....	10
<b>ARGUMENT:</b>	
POINT I—Devins was not denied effective assistance of counsel .....	12
POINT II—The Court's evidentiary rulings and the prosecutor's conduct of the trial were entirely proper .....	23
A. The admission of the evidence concerning Devins' attempt to arrange another SBA loan for John Ferguson and the Court's later striking of that evidence resulted in no prejudice .....	23
B. The Court was correct in finding that Siviglia's testimony concerning Devins' in- volvement in the distribution of porno- graphic cassettes did not prejudice the de- fendant .....	27
C. The prosecutor acted properly in correcting Grosvalet's mistaken testimony by calling Siviglia to the stand to testify that his handwriting, not Devins, appeared on certain draft documents .....	29

	PAGE
D. The prosecutor's notes of his interview with Grosvalet were not producible under 18 U.S.C. § 3500 or <i>Brady v. Maryland</i> , and in any event, the district court correctly determined that there was no deliberate suppression of this material and that the material, if turned over, could not have induced a reasonable doubt .....	34
POINT III—The Court did not err in refusing to compel King to testify .....	45
CONCLUSION .....	48

## TABLE OF CASES

<i>Brady v. Maryland</i> , 373 U.S. 93 (1963) .....	34, 44
<i>Giglio v. United States</i> , 405 U.S. 150 (1972) .....	29
<i>Goldberg v. United States</i> , 44 U.S.L.W. 4424, — U.S. — (March 30, 1976) .....	34, 39
<i>Hoffman v. United States</i> , 341 U.S. 479 (1951) ....	46
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972) ....	47
<i>Ladakis v. United States</i> , 283 F.2d 141 (10th Cir. 1960) .....	27
<i>Monsivais v. United States</i> , 421 U.S. 976 (1975) ..	47
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959) .....	29
<i>Remus v. United States</i> , 291 F. 501 (6th Cir. 1923), cert. denied, 263 U.S. 717 (1924) .....	27
<i>Tallo v. United States</i> , 344 F.2d 467 (1st Cir. 1965) ..	29
<i>United States v. Acosta</i> , 526 F.2d 670 (5th Cir. 1976)	34
<i>United States v. Badalamente</i> , 507 F.2d 12 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975) .....	13

	PAGE
<i>United States v. Bautista</i> , 509 F.2d 675 (9th Cir.), cert. denied, sub nom <i>Monsivais v. United States</i> , 421 U.S. 976 (1975) .....	47
<i>United States v. Bergman</i> , 354 F.2d 931 (2d Cir. 1966) .....	25
<i>United States v. Berrigan</i> , 482 F.2d 171 (3d Cir. 1973) .....	47
<i>United States v. Bynum</i> , 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974) .....	25, 29
<i>United States v. Calabro</i> , 467 F.2d 973 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973) .....	26
<i>United States v. Calles</i> , 482 F.2d 1155 (5th Cir. 1973)	27
<i>United States v. Carroll</i> , 510 F.2d 507 (2d Cir. 1975)	14
<i>United States v. Catalano</i> , 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974) .....	25
<i>United States ex rel. Crispin v. Mancusi</i> , 448 F.2d 233 (2d Cir.), cert. denied, 404 U.S. 967 (1971)	13
<i>United States v. Currier</i> , 405 F.2d 1039 (2d Cir.), cert. denied, 395 U.S. 914 (1969) .....	13
<i>United States ex rel. Davis v. McMann</i> , 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968) .....	22
<i>United States v. DeSapio</i> , 456 F.2d 644 (2d Cir.), cert. denied, 406 U.S. 933 (1972) .....	44
<i>United States v. Domenech</i> , 476 F.2d 1229 (2d Cir.), cert. denied, 414 U.S. 840 (1973) .....	46
<i>United States v. Frascione</i> , 299 F.2d 824 (2d Cir.), cert. denied, 370 U.S. 910 (1962) .....	46
<i>United States v. Giallo</i> , 206 F.2d 207 (2d Cir. 1953), aff'd, 346 U.S. 929 (1954) .....	25

	PAGE
<i>United States v. Hero</i> , Dkt. No. 74-1396, <i>aff'd without opinion</i> (March 5, 1976) .....	28
<i>United States v. Hilton</i> , 521 F.2d 164 (2d Cir. 1975) .....	42
<i>United States v. Katz</i> , 425 F.2d 928 (2d Cir. 1970) .....	14
<i>United States ex rel. King v. Schubin</i> , 522 F.2d 527 (2d Cir. 1975), <i>cert. denied</i> , — U.S. — (1976) .....	13
<i>United States v. Kompinski</i> , 373 F.2d 429 (2d Cir. 1967) .....	26
<i>United States v. Kurzer</i> , Dkt. No. 75-1437 (2d Cir., April 14, 1976) .....	47
<i>United States ex rel. Marcelin v. Mancusi</i> , 462 F.2d 36 (2d Cir. 1972), <i>cert. denied</i> , 401 U.S. 917 (1973) .....	14
<i>United States v. Marshall</i> , 458 F.2d 446 (2d Cir. 1972) .....	26
<i>United States ex rel. Maselli v. Reincke</i> , 383 F.2d 129 (2d Cir. 1967) .....	13
<i>United States v. Matalon</i> , 445 F.2d 1215 (2d Cir.), <i>cert. denied</i> , 404 U.S. 853 (1971) .....	18
<i>United States v. Maxey</i> , 498 F.2d 474 (2d Cir. 1974) .....	13
<i>United States v. Miranda</i> , 526 F.2d 1319 (2d Cir. 1975) .....	44
<i>United States v. Morrison</i> , 365 F.2d 521 (D.C. Cir. 1966) .....	47
<i>United States v. Matalone</i> , 526 F.2d 1160 (2d Cir. 1975) .....	33
<i>United States v. Parness</i> , Dkt. No. 75-1369 (2d Cir. Jan. 12, 1976), slip op. 1463 .....	44
<i>United States v. Plante</i> , 472 F.2d 829 (1st Cir.), <i>cert. denied</i> , 411 U.S. 950 (1973) .....	25

	PAGE
<i>United States v. Sanchez</i> , 483 F.2d 1052 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 991 (1974) . . . . .	13
<i>United States v. Sangemino</i> , 401 F. Supp. 903 (S.D. N.Y. 1975) . . . . .	17
<i>United States v. Silverman</i> , 430 F.2d 106 (2d Cir. 1970), <i>cert. denied</i> , 402 U.S. 953 (1971) . . . . .	44
<i>United States v. Smaldone</i> , 484 F.2d 311 (10th Cir. 1973), <i>cert. denied</i> , 415 U.S. 915 (1974) . . . . .	34, 39
<i>United States v. Sperling</i> , 506 F.2d 1323 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 962 (1975) . . . . .	22
<i>United States v. Stofsky</i> , 527 F.2d 237 (2d Cir. 1975) . . . . .	47
<i>United States v. Stromberg</i> , 268 F.2d 256 (2d Cir.), <i>cert. denied</i> , 361 U.S. 863 (1959) . . . . .	25, 29
<i>United States ex rel. Tatman v. Anderson</i> , 391 F. Supp. 68 (D. Del. 1975) . . . . .	47
<i>United States ex rel. Testamark v. Vincent</i> , 496 F.2d 641 (2d Cir. 1974), <i>cert. denied</i> , 421 U.S. 951 (1975) . . . . .	14, 22
<i>United States v. Tomaiolo</i> , 249 F.2d 683 (2d Cir. 1957) . . . . .	25
<i>United States ex rel. Walker v. Henderson</i> , 492 F.2d 1311 (2d Cir.), <i>cert. denied</i> , 417 U.S. 972 (1974) . . . . .	13, 18
<i>United States v. Wight</i> , 176 F.2d 376 (2d Cir. 1949), <i>cert. denied</i> , 338 U.S. 950 (1950) . . . . .	13
<i>United States v. Wilson</i> , 488 F.2d 1231 (2d Cir.), <i>rev'd on other grounds</i> , 421 U.S. 309 (1975) . . . . .	46
<i>United States v. Yanishefsky</i> , 500 F.2d 1327 (2d Cir. 1974) . . . . .	13, 18
<i>United States v. Zane</i> , 507 F.2d 346 (2d Cir. 1974), <i>cert. denied</i> , 421 U.S. 910 (1975) . . . . .	44

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 76-1007

---

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

GERALD DEVINS,

*Defendant-Appellant.*

---

### BRIEF FOR THE UNITED STATES OF AMERICA

---

#### Preliminary Statement

Gerald Devins appeals from a judgment of conviction entered on November 13, 1975, in the United States District Court for the Southern District of New York, after a 13-day jury trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 74 Cr. 1052, filed on November 8, 1974, charged Devins in Count One with having conspired together with Claude Hill and Max King to defraud the Small Business Administration ("SEA"), in violation of 18 U.S.C. § 371. In Counts Two and Three Devins was charged with having made false statements to the SBA, in violation of 18 U.S.C. §§ 1001 and 2; and in Count Four he was charged with having overvalued a security

in an application for an SBA loan, in violation of 15 U.S.C. § 645(a).\*

Trial began on April 7, 1975 \*\* and ended on April 23, 1975 when the jury found Devins guilty on all counts.

On October 28, 1975, Devins' counsel moved pursuant to F.R. Crim. P. 29 and 30 for dismissal of the indictment, a judgment of acquittal or a new trial. A three-day hearing was held from November 3 to 6, 1975, and on November 11, 1975, the motion was denied in all respects.

On November 13, 1975, Judge Gagliardi sentenced Devins to concurrent terms of 15 months imprisonment on Counts One, Two and Three, to be served concurrently with a term of 6 months imprisonment on Count Four, the imprisonment to be followed by a term of 2 years probation.

Devins remains free on bail pending this appeal.

## Statement of Facts

### The Government's Case

#### A. Synopsis

The Government proved at trial that Devins caused the preparation of an application for a \$50,000 SBA Economic Opportunity Loan using Robert B. Grosvalet, a young, naive, disabled Vietnam veteran as a pawn. To

---

\* Co-defendant Claude Hill was charged in Counts 1 and 3 and was acquitted on both Counts on the 14th day of trial. Co-defendant Max King was charged in Count 1 and was severed on the 9th day of trial after he pleaded guilty to a violation of 26 U.S.C. § 7203. On September 4, 1975, a *nolle prosequi* was filed as to King on the instant Indictment, 74 Cr. 1052.

\*\* The docket entries erroneously indicate that trial commenced on May 7, 1975.

obtain the loan, Devins set up a company, R.B.G. Film Distributors Inc. ("RBG") with Grosvalet (whose only experience in the entertainment or sales had been as a stock boy in a record store) as president and Grosvalet's girl friend Sylvie Kristoff as secretary. Grosvalet's reward was to be steady employment delivering films.

Devins supervised the fabrication of the loan application and all of the supporting documents which included a balance sheet falsely showing the net worth of the company to be \$15,000. Among the false documents submitted was a contract between RBG and National Telepix, a then non-existent corporation, which allegedly authorized RBG to distribute the "Wally Western" film series, which was owned by neither National Telepix nor Devins. The loan application was prepared in such a way as to render Grosvalet solely liable for repayment of the loan which was collateralized with \$47,500 worth of film he had never owned and with his personal guarantee which was based on a grossly inflated personal financial statement.

After the loan application was submitted to the SBA, and as part of its processing, Grosvalet was interviewed by a volunteer from Service Corps of Retired Executives (SCORE). Devins responded to all of the questions asked by the SCORE representative, as he had previously done when Dunn and Bradstreet had attempted to check Grosvalet's credit, by providing substantially false information.

Finally, the loan was approved, and on May 15, 1974, \$50,000 was disbursed to Grosvalet of which \$30,000 immediately went to Max King, an associate of Devins' and "president" of the bogus National Telepix, in payment for the "Wally Western" films. Grosvalet never received the films, and Devins, who had received a total of \$3,900 from Grosvalet, withdrew from the scene as Grosvalet went to the authorities.

## B. The proof at trial

After having served two years in the Army, Robert Grosvalet was discharged in 1969 with a 50% disability for a nervous condition. After his discharge, Grosvalet worked briefly in a music store and was then unemployed for the rest of 1970. In November 1970, he entered the hospital for an operation where he remained until May of 1971. After a 6-month recuperation, he worked part-time in a book store for a few months, and then for 6 months he worked as a stock boy in a music store, followed by a short stint in a warehouse. He then took another job as a stock boy. (Tr. 186-89).\*

In mid-June 1973, Grosvalet and his girlfriend Sylvie Kristoff were present at Leonard Kirtman's film studio to do some breathing for the sound track of a pornographic film. (Tr. 190). As they were waiting to begin their work, Larry Grosberg appeared and asked if anyone was a veteran. (Tr. 181, 191, 991). Grosvalet replied that he was, and he was then summoned into an office where the door was closed behind him. (Tr. 182, 991).

Inside the office, Grosvalet was introduced by Grosberg to the defendant Devins. Leonard Kirtman was also present. Grosberg asked Grosvalet if he was interested in owning his own business. (Tr. 191). Devins then explained that Grosvalet could get an SBA loan and then go into the business of selling film and that he, Kirtman and Grosberg would be his partners. Grosvalet would be president of the company and receive a salary. (Tr. 193, 194, 537, 538, 687, 691).

---

\* References to "Tr." are to the trial transcript; "GX" to Government exhibits; "DX" to defense exhibits; "App." to defendant's appendix; "Br." to defendant's brief; and "Tr. H." to the transcript of the post-trial hearing.

The next day, pursuant to Devins' instructions, Grosvalet and Kristoff went to SBA to pick up loan application forms. At first Grosvalet was turned down because he told an SBA official that he was in the film production and distribution business, which did not qualify for a loan. However, after being counseled by Devins, Grosvalet returned and told the SBA officer that he was only in the film distribution business, which was a qualifying enterprise. (Tr. 197). Grosvalet was then given the necessary application forms which he promptly delivered to Devins' office at 4584 Austin Boulevard, Island Park, New York. (Tr. 198, 994).

When Grosvalet arrived with the forms, Devins took some personal history information from Grosvalet and began preparing the loan application. Devins also introduced his business associate Nicholas Siviglia (Tr. 1153)\* and explained to Siviglia that Grosvalet was going into the film business with Grosberg and Kirtman (Tr. 1154) and that he, Devins, was to arrange Grosvalet's financing. According to Devins, he, Grosberg and Kirtman were to be Grosvalet's partners and Grosvalet, who Devins later characterized to Siviglia as merely a front man or pawn (Tr. 1155-56), would be the president.

Devins asked Siviglia to assist him with Grosvalet's SBA application. Devins prepared a balance sheet, personal financial statement, and projections for REG on a single 14-column work sheet which he then had Siviglia transcribe onto individual drafts. (Tr. 1158). Devins

---

\* In the spring of 1973 Siviglia, a navy veteran and an insurance agent, became associated with Devins to do insurance work. (Tr. 1134, 1137). Devins wanted Siviglia to join with him on the ground floor of a deal where they would deal with several public companies and make some money and get some stock. (Tr. 1135).

also had Siviglia prepare a proposal for advertising for RBG to be conducted by Directional Advertising.\* (GX 7; Tr. 1250).

After preparing the draft loan documents, Siviglia gave them to Devins who made some changes and gave them to his secretary to type. At trial, Siviglia identified drafts of the documents he had prepared for the RBG loan all of which were in his handwriting: \*\* the loan application (GX 1A); Grosvalet's personal financial statement (GX 2A); the "history" of the RBG business (GX 3A); a resume of Grosvalet's business experience (GX 5A); a statement concerning the expected use of the loan proceeds (GX 6A); a balance sheet (GX 8A); and the projection of RBG operations (GX 9A). (Tr. 1160-62).

Thereafter, Devins called Grosvalet back to his office to pick up the completed application for the \$50,000 SBA loan. After receiving the forms from Devins, Grosvalet took them to the SBA.\*\*\* The loan application

---

\* Directional Advertising had been formed by Siviglia, but had ceased to do any business by early June of 1973. In January of 1974 Devins incorporated the company. (Tr. 1180).

\*\* Grosvalet testified at trial several days before Siviglia that the writing on three of the work copies (GX 1A, 2A and 3A) appeared to be that of Devins. (Tr. 230, 238, 243-4). Sylvie Kristoff also testified that she saw a paper prepared by Devins which she *thought* was a balance sheet or projection. (Tr. 1092). One of the issues urged by Devins on appeal is that the Government improperly allowed Grosvalet to testify falsely concerning the authorship of those forms.

\*\*\* Among the papers given to Grosvalet by Devins and delivered to the SBA were the loan application (GX 1), which falsely showed that Grosvalet owned RBG together with \$47,500 worth of film which was shown as collateral; a personal financial statement (GX 2) which falsely placed Grosvalet's net worth at \$20,000, including \$15,000 worth of stock in RBG (Tr. 235-

[Footnote continued on following page]

was then checked by an SBA official who provided Grosvalet with a check list (GX 29) of several missing documents, which Devins later furnished. (Tr. 205, 206, 257).\*

On August 1, 1973 Devins summoned Grosvalet to his office and introduced him to Claude Hill. Devins

---

42); an utterly fictitious "history" of RBG's business (GX 3) (Tr. 243-44); a description of the benefits of the loan (GX 4); an explanation as to how the proceeds would allegedly be used (GX 4) (Tr. 249); and a resume (GX 5) which was substantially false (Tr. 262-65). Devins also gave Grosvalet a letter contract with Directional Advertising (GX 7) (Tr. 275, 278) and a totally false balance sheet for RBG (GX 8). (Tr. 278-284).

\* Among the papers finally delivered to SBA was a letter from National Telepix, Inc., which listed its address as 4584 Austin Blvd, Island Park, New York, to RBG dated June 15, 1973 (GX 10) and signed in the name of Claude Hill which purported to give RBG exclusive film distribution rights to the Wally Western film series. Handwriting analysis revealed that Hill's signature on this letter was a forgery. (Tr. 325). Moreover, according to Richard Shields, president of American Diversified Industries (ADI) the real National Telepix Inc. was first incorporated in 1959 and went public in 1961. In 1968 the name was changed to ADI. In order to retain the name National Telepix, a subsidiary called National Telepix, Inc. was formed. (Tr. 1391). In 1972 and early 1973 Devins tried unsuccessfully to raise capital to obtain control of National Telepix Inc. in its public form after a spin-off from ADI. In anticipation of Devins' acquisition the company name was changed by Shields, at Devins' request, to Prestige Industries, Inc. Prestige was never active. Indeed, Devins never had any connection with either the first or second National Telepix or Prestige Industries (Tr. 1406), and Devins never had access to or permission to use the Wally Western films (Tr. 1409) which belonged to ADI. Nor did ADI do any business with Devins after December of 1972 (Tr. 1422).

Frank Naudus, a printer from the vicinity of Devins' office in Island Park, New York identified the National Telepix stationery, (which listed the "World Headquarters" of that company at 4584 Austin Boulevard, Island Park, New York—Devins' office address) as having been ordered by Devins. (Tr. 427).

explained that Grosvalet and Hill were to sign a film distribution contract between RBG and National Telepix for the Wally Western Film series—a film series which National Telepix did not own. (GX 11; Tr. 113, 448).<sup>\*</sup> Hill signed (Tr. 337), but Grosvalet took the contract home in order to get legal advice because he did not understand it. Later, however, without consulting an attorney he signed the contract, returned it, and later delivered it to SBA. Still later at Devins' direction Grosvalet signed and submitted to the SBA an addendum to the contract, which provided for a refund of \$25,000 to SBA if the contract was terminated at the end of 6 months. (GX 11A).<sup>\*\*</sup>

Shortly thereafter, while Grosvalet was in Devins' office, Dunn & Bradstreet called to speak to Grosvalet about his financial status. Unable to handle the questions posed to him, Grosvalet turned the phone over to Devins who introduced himself as Hank Meyer, Grosvalet's accountant, and proceeded to furnish information which was, for the most part, entirely false. (Tr. 345, 998-99, 1181).

On October 10, 1973 Grosvalet was summoned by Devins to his office where he met with Irving Singer, a

---

<sup>\*</sup> The most valuable part of the purported contract between RBG and National Telepix (GX 11) was Grosvalet's right to receive a Laboratory Access Letter which authorized its bearer to have copies of the films made from the original master negative which was safeguarded at a film laboratory. According to Louis Wolfe, the custodian of records at Movie Lab, the Wally Western Series was then owned by another corporation, ADI, and Devins' National Telepix had no right to it. (Tr. 1409).

<sup>\*\*</sup> Bertram Schulman of SBA testified that great reliance had been placed on the film distribution contract and the supporting papers in approving Grosvalet's loan (Tr. 1310, 1350), and that the authorization for the loan contemplated the film as collateral backed by Grosvalet's personal guarantee. (Tr. 1314).

representative of SCORE, who was assigned by the SBA to interview him and evaluate his loan request. Also present were Kristoff and Siviglia both of whom waited outside while Devins, Guy Runyon \* and Grosvalet met with Singer. (Tr. 1000). During this meeting, Grosvalet answered no questions, saying little more than "hello" and "goodbye", while Devins fielded most of Singer's questions. (Tr. 353, 731-32). Devins furnished Singer with false information which was entered in the SCORE report (GX 18), concerning Grosvalet's alleged former employment and business experience, the reason Grosvalet entered into the film business, and Grosvalet's alleged knowledge of business needs. (Tr. 868).

Around the same time, Grosvalet had an argument with Grosberg and as a result did not want to have anything more to do with him. (Tr. 750-51). Grosvalet told Siviglia that Kirtman and Grosberg were not interested in his views and would not even discuss the business with him. (Tr. 1041, 1056). As a result, in March of 1974 Grosvalet called Bertram Schulman of the SBA and told him to cancel the loan because he did not feel responsible enough at the time to take on an obligation of that size. (Tr. 375, 1301). Schulman advised him to think it over.

Shortly thereafter, Grosvalet called Devins and told him what he had done and why. Devins urged Grosvalet to call Schulman back and reinstate the loan. Grosvalet met then with Devins, Claude Hill and Max King who convinced him to continue with the loan. (Tr. 382). To sweeten the pot they offered Grosvalet, free, a Sean

---

\* Guy Runyon, formerly a vice-president of Transamerica Film Corporation, first met Devins at the offices of that corporation (Tr. 921) when Devins would come about once a week and meet with Claude Hill and Elvin Feltner. (Tr. 922). On one occasion in 1972 or 1973 Devins told Runyon "If you can get a vet, why, I could get you an SBA loan." (Tr. 923, 924).

Connery film \* worth at least \$15,000 with which Grosvalet was told he could do anything he wished. (Tr. 384). Grosvalet relented and notified Schulman that he would go ahead with the loan. (Tr. 1303).

On May 15, 1974, the proceeds of the loan were disbursed by the SBA. (Tr. 1002). Grosvalet immediately gave King, then the alleged president of National Telepix, a check for \$30,000 for the Wally Western films. Grosvalet never received any of the film and was equally unsuccessful in getting his money back. Thereafter, he complained to the State Attorney General's office which referred him to the United States Attorney. (Tr. 393-401). Devins, who had received \$3,900 of the loan proceeds for two months rent of a 9' x 12' room in his office and advertising, disappeared from the scene.

### **The Defense Case**

The defense consisted of Devins' attempt to prove that Siviglia, Hill, King, and Elvin Feltner (Hill's business associate), were the real culprits in that they needed the money to bail out American Diversified Industries, Inc. (ADI), a corporation in which they had an interest.

The first defense witness was Grosvalet who identified his signature on the corporate banking resolution for the RBG checking account, although he could not recall preparing the document. (Tr. 1529).

Allan Greene of the American Bank and Trust Company was next called upon to testify (Tr. 1537-38) (in an unsuccessful attempt by Devins to propose the motive

---

\* A Sean Connery film was listed among the assets in the draft of the balance sheet (GX 8A) but was not included in the final version (GX 8) (Tr. 1257). Grosvalet never received this film despite a dozen requests for it. (Tr. 386).

for Hill, King and others associated with ADI to obtain money by way of Grosvalet's loan) that ADI owed the bank approximately \$50,000 during 1973 and 1974. (Tr. 1537-38).

August Della Pietra, a friend of Devins (Tr. 1602), who was employed by Devins for about four months during the summer of 1973 as an insurance agent, testified that Grosvalet complained because Siviglia was too slow with his SBA application. (Tr. 1542, 1544, 1551).

Lawrence Grosberg (an unindicted co-conspirator) testified that during the summer of 1973 he met at the Kirt Films Studio with Kirtman, Hill and Devins to discuss a business deal. (Tr. 1609, 1611). Grosvalet and Kristof were there to do some over-dubbing, and Grosvalet was looking for a job. (Tr. 1610). During a break in the discussions Grosberg invited Grosvalet in to meet Devins and Kirtman. He introduced Grosvalet to Devins, who was in the film business, and told him that Grosvalet, who had an interest in the film business, was looking for a job. (Tr. 1612). Grosberg denied being a partner or having any interest in Grosvalet's business dealings (Tr. 1617) and was unable to recall any further conversation (Tr. 1614), denying any *recollection* that he had asked whether any veteran was present. (Tr. 1635). Grosberg further testified that he spoke to Grosvalet on several occasions thereafter and discussed the business deal in which Grosvalet was involved. (Tr. 1616).

On cross-examination, Grosberg identified several documents which he received from Devins (GX 46, 47; DX R) concerning a merger Devins was promoting between himself, Grosberg and Kirtman. (Tr. 163). One of the documents was on the letterhead of National Telepix with its "World Headquarters" at 4584 Austin Boulevard, Island Park, New York, the address of Devins' offices. Grosberg, Kirtman, Devins and Hill discussed the proposed merger several times but it never came about. (Tr. 1634).

Elvin Feltner was called as a hostile witness in an unsuccessful attempt to establish a scheme between himself, Hill, and King (using Devins as an innocent dupe) to obtain the proceeds of the RBG loan through a complex system of corporate entities. He instead corroborated the testimony of Government witnesses that Devins had nothing whatever to do with National Telepix or the Wally Western films. (Tr. 1707, 1750).

Andrew B. Heberer, a handwriting expert, identified known samples of Devins' handwriting (DX A13; Tr. 1976) and testified that the draft SBA loan documents (GX 1A, 2A, 3A, and 5A), although written by the same person (Tr. 1932), were not in Devins' handwriting. (Tr. 1978). Based on documents submitted to him which allegedly bore Siviglia's handwriting he stated (not surprisingly since Siviglia had already so testified) that Siviglia had authored the draft documents. (Tr. 1981-82). However, Heberer admitted he was not shown other draft loan documents (GX 6A, 8A, 9A, 10A, 11A and 11B) and therefore could express no conclusion as to their authorship. (Tr. 1983).

## ARGUMENT

### POINT I

**Devins was not denied effective assistance of counsel.**

Devins claims that due to a substantial conflict of interest and disloyalty on the part of his trial attorney, Bernard Coven, he was denied effective assistance of counsel. The causes assigned by Devins for his counsel's ineffective performance are two-fold: (a) a preoccupation by Coven with his alleged deteriorating financial situation; and (b) disloyalty by Coven when he allegedly learned during the trial that Devins had previously at-

tempted to inform on Coven in return for his own immunity. Devins' claim that he was deprived of an effective defense—the subject of an extensive post-trial hearing—was rejected by the trial judge, whose findings are supported by the evidence adduced at the hearing and by his own intimate acquaintance with the conduct of the trial.

The current standard for ineffective assistance of counsel in this circuit is that the representation must be so "woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice." *United States v. Badalamente*, 507 F.2d 12, 21 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States v. Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969), quoting *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); see also *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States v. Sanchez*, 483 F.2d 1052, 1057 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974). To meet this test, counsel's overall representation must be so horribly inept as to amount to a breach of his client's interest. *United States ex rel. King v. Schubert*, 522 F.2d 527, 529 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States ex rel. Maselli v. Reincke*, 383 F.2d 129, 132 (2d Cir. 1967); *United States v. Sanchez*, *supra*.

This standard must be applied to the character of the resultant proceedings before the court and not merely to the time spent in preparation or research of the case. *United States v. Yanishefsky*, *supra*; *United States v. Maxey*, 498 F.2d 474, 483 (2d Cir. 1974); *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 237 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971). Moreover, the quality of representation cannot be measured in the abstract, but

must be determined with reference to the strength of the case confronting defense counsel. *United States ex rel. Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), cert. denied, 421 U.S. 951 (1975); *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 45 (2d Cir. 1972), cert. denied, 401 U.S. 917 (1973); *United States v. Katz*, 425 F.2d 928, 930 (2d Cir. 1970). Cf. *United States v. Carroll*, 510 F.2d 507, 512 (2d Cir. 1975).

Fully cognizant of these well-settled legal principles, Judge Gagliardi, who had witnessed first-hand the quality of representation received by Devins, made the following findings with respect to counsel's conduct of the trial:

"As far as the conduct of the trial, in the very beginning of this trial I think Mr. Coven indicated that it was his opinion that this was a documents case; that what was involved was the question of what did these documents mean, by whom were they executed, and so forth. I believe he had offered Mr. Wilson [the prosecutor] the opportunity to consent to the admission of all of these documents into evidence, and Mr. Wilson refused because he thought tactically it would be better, as I recall it, to have the witnesses come in and spread the whole, as Mr. Wilson thought, gory details of what went on before this jury. Mr. Wilson and I grew to regret that decision because the first document that was offered could not be authenticated and there was a question as to whether or not any of the documents were going to go in because Mr. Coven properly raised the objections as to the authenticity of the documents and the records of the SBA being such as they were, having no receipt stamps or any other kind of stamp to indicate when they had received the documents or any other way of really identifying what was submitted to them and what was not.

*I suggest Mr. Coven and the manner in which he handled that almost succeeded, on a technicality, as I see it, of having the indictment herein dismissed. So I believe that he was adequately prepared to try this case; that he did try it well. We had our differences as we went along because of certain matters that arose during the trial and his failure to abide by the manner in which I like a trial to be conducted and the promptness and attention that I like attorneys to give when a case is tried before me; but as far as the manner in which he conducted this trial, far from being shocked or my conscience being shocked by the manner in which he presented it, I believe that he handled it competently. He is an experienced counsel and he knew what was involved in this case, and I find that there was adequate representation.*

The only, I must confess on the record, criticism that I might have was the question of the summation which appeared to me to be short. But I don't find in any way that that was a failure of representation. Every attorney has a different way in which he appraises the effect upon a jury of what he has to say and I cannot and do not find that that item arose to the level of inadequate assistance of counsel.

I suppose many of us believe that cases are not won in either opening statements or summations of counsel but by the quantum of the proof, and I can't say in this case that the quantum of proof was such that a jury would have come to a different verdict if they had the most outstanding summation that has ever been delivered in any court on behalf of Mr. Devins at the time of summation in this case.

Under all the circumstances, the motion is denied." (App. "D", at 28-30) (emphasis supplied).

The finding by the trial judge that Devins had received competent representation was supported by abundant evidence. Prior to trial, Coven assiduously obtained pre-trial discovery and a bill of particulars. Moreover, despite defense counsel's claim of unpreparedness at the start of trial—admittedly a delaying tactic—he was, as the Court found, nearly able to bring the Government's case to an abrupt halt on a technicality when the Government was unable to establish SBA's method of recording the receipt of documents.

Thereafter, each of the Government's witnesses was thoroughly cross-examined. Grosvalet, for example, was cross-examined for over two days. During the course of the trial, Coven made a total of 411 objections, 32 motions to strike and 12 motions for a mistrial—hardly indications of an inattentive attorney. Examples of his vigorous attempts to protect his client's interests against overwhelming evidence of guilt include: (1) on April 11th he complained of a conflict on the part of defense counsel jointly representing Hill and King, contending that Devins was being prejudiced (Tr. 804-05); on April 11th he successfully raised an objection to the Ferguson similar act testimony (Tr. 825), which has led to an issue on appeal (Br. at 56); on April 16th he launched a vigorous attack on the prosecution accusing it of having allowed Grosvalet to commit perjury (Tr. 1313-25), which has led to still another issue on appeal (Br. at 66); on April 21st, he reported to the court on the status of the various witnesses he had subpoenaed (Tr. 1661), and during the morning, articulated his theory of the case to the court out of the presence of the jury (Tr. 1690-1701), totally belying the claim that he had not prepared his case or had abandoned it; and on April 22nd, the day before the summation, Coven completed a blistering examination of Elvin Feltner whom he considered a hostile witness.

Nor was the trial judge in error in finding that, in light of the strength of the Government's case, even the most able of defense lawyers could not have convinced the jury to alter its verdict. The proof overwhelmingly showed that Devins was intimately involved in a scheme to fraudulently obtain SBA loans. He was shown to have obtained an inexperienced, naive, and impecunious veteran as a front man (Tr. 1155-56); fabricated a film distribution business, complete with financial statements which falsely showed the existence of substantial assets (Tr. 235-84, 1158; GX 1-10); and prepared and caused to be submitted a \$50,000 SBA loan application. He then insured that the loan would be approved by preparing a completely fraudulent film distribution contract with a non-existent company for film it did not own (Tr. 113, 448, 1409; GX 11); and furnished false information to a credit bureau (Tr. 345, 998-99, 1181) and a SCORE investigator. (Tr. 353, 731-32). This was, in short, a case where the proof of guilt was so overwhelming "that Patrick Henry reincarnate could not acquit [the defendant]." *United States v. Sangemino*, 401 F. Supp. 903, 915 (S.D.N.Y. 1975).

In the face of Judge Gagliardi's findings that defense counsel performed competently, Devins raises a variety of claims which were fully aired below. The first is the assertion that defense counsel was so preoccupied with his own deteriorating financial condition that he did not devote sufficient attention to the defense. While this complaint was, we believe, adequately disposed of by Judge Gagliardi's findings based on the overall conduct of the trial, we turn to Devins' specific claims of prejudice.

The first claim of prejudice in this regard is that co-counsel, Mr. Farley, ineptly handled the examination of two defense witnesses, Bernard Creamer and Andrew Heberer, during Mr. Coven's temporary absence from the courtroom to attend a hearing in Bankruptcy Court.

Creamer, a bank officer, was called in an effort to place bank records before the jury. The inability of the defense to introduce those documents was caused not by Coven's absence from the courtroom, but by Creamer's failure to bring the original bank records. (Tr. H. 50).

The examination of Heberer, the handwriting expert, was correctly handled by Farley, and was frustrated only because Devins had not previously supplied him with samples of his handwriting, though he had been told to do so. (Tr. H. 165). In any event, as the Court found, since Siviglia admitted his handwriting was on the draft loan document, the jury was not misled and could not have been misled into believing this was Devins' handwriting on the application." (App. "D", at 24).

Secondly, Devins argues that August Della Pietra was not properly prepared to testify, however, he was not told of the existence of a tape recording between himself, Grosvalet and Kristoff. Although Della Pietra testified falsely concerning his conversations with Grosvalet about the loan application (Tr. 1575-79), Coven cannot be faulted for assuming that Della Pietra would tell the truth regardless of the existence of a tape recording.

Devins also argues defense counsel should have called a variety of witnesses to the stand. It has long been recognized that the selection of witnesses is a matter of defense strategy which should not later be second-guessed, *United States v. Yanishefsky, supra*; *United States ex rel. Walker v. Henderson, supra*; *United States v. Matalon*, 445 F.2d 1215, 1219 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971), but we think it is important to examine Devins' claims in this regard a bit closer to fully understand what a desperate claim this truly is.

Devins argues that most significantly he himself wished to testify, and defense counsel refused to let him do so. What Devins does not candidly acknowledge is that at the post-trial hearing, Coven explained that he

had had lengthy discussions with Devins concerning whether he should testify, and it was ultimately agreed that he would not; when Coven was asked why it had been decided not to have Devins testify, counsel then representing Devins successfully interpose<sup>7</sup> an objection based on attorney-client privilege (Tr. H. 52).\*

Devins also argues that Leonard Kirtman should have been called as a defense witness because of certain exculpatory matter he would have testified to. Devins again conveniently overlooks Kirtman's hearing testimony that he had overheard discussions between Devins, Grosberg and Grosvalet concerning a film distribution company and an SBA loan. (Tr. H. 193-94). This testimony would have been extremely helpful to the Government since it would have corroborated Grosvalet and directly ~~contradicted~~ defense witness Grosberg, who denied any business relationship with Grosvalet. (Tr. 1617).

Finally, Devins argues that his attorney learned, through an allegedly improper disclosure by the prosecutor,\*\* that Devins had attempted to obtain immunity

---

\* Devins refused to waive his attorney-client privilege at the hearing on five occasions. In denying the post-trial motion predicated on ineffective assistance of counsel, Judge Gagliardi noted that Devins' invocation of his privilege had restricted Covens' ability to defend himself. (App. "D", at 27).

\*\* Devins contends (Br. at 49 n.46) that no legitimate purpose existed for the prosecution's disclosing to anyone Devins' treachery toward his lawyer. While it is not in the record one principal reason did exist: Sivilgia was an informer on the activities of Devins and others with respect to a wide variety of fraudulent dealings which went well beyond those covered by the instant indictment. As such it was necessary to discuss in some detail the scope of Devins' and his associates' activities—among whom we number Bernard Coven. Moreover, it was never anticipated or intended that the information would get back to Coven, and the record below supports the conclusion that it did not.

for himself by offering to inform the Government of Coven's alleged unrelated criminal activities and that his attorney, through "understandable animus", subverted Devins' defense. (Br. at 44). We begin by noting that, although Devins argues this contention as if Judge Gagliardi had found that Coven had been informed of Devins' treachery (Br. at 44, 48), there is no such finding below. (See App. "D" at 28-30). Indeed, it would be all but incredible to believe that Coven had been so informed.

The contrived nature of Devins' claim is readily disclosed by his conduct after the trial came to an end. At the post-trial hearing, Devins alleged that Coven told him in the midst of the trial that he was aware of Devins' attempted treachery. Yet Devins voiced no complaint at the trial *nor for six months thereafter*. Moreover, during that six month intervening period, Devins appeared twice in court with Coven where they sought to have counsel appointed for Devins solely because of a lack of funds. As Judge Gagliardi observed at the hearing:

"I am very disturbed about the fact that this case has dragged on since April of this year when the trial was concluded and here we are in the early part of November. There are an awful lot of dilatory tactics, really, none of which are attributable to the Government. I think a lot of this should have been avoided, could have been avoided, and to some extent is intentional." (Tr. H. 176-77).

Furthermore Coven testified at the hearing, without contradiction, that after the trial he continued to represent Devins in various civil matters and had dinner with him. On many occasions Coven took Devins to his office and gave him advice on what his grounds for appeal might be. As late as October 24, 1975, Coven consulted with Devins concerning his right for a new trial and delivered various papers to him. (Tr. H. 39).

The incredible nature of this claim was also apparent from the hearing testimony. Devins testified at the hearing that he had sought immunity from the Government in September, 1974 by attempting to provide information about Coven's alleged violations of the securities laws—a fact uncontested at the hearing. But Devins went on to claim that, while Siviglia was on the stand testifying for the Government, Coven told him that he had been advised by one Leonard Randell that Siviglia had told Randell about Devins' attempt to trade him to obtain immunity. To corroborate this story, Devins called Robert Quigley, a business associate of Devins, who had an obvious interest in keeping Devins out of jail.\* Quigley claimed that Coven had complained to him during the trial that he had learned from Leonard Randell, who in turn had obtained the information from Siviglia (Tr. H. 95), about Devins' attempt to make a deal with the United States Attorney. (Tr. H. 94). Later in his testimony, Quigley, plainly unable to keep his story straight, claimed that Coven told him during the trial that *Siviglia*, not Randell, had informed him of Devins' proposed treachery. (Tr. H. 131).

The contrived nature of this claim became readily apparent when Siviglia took the stand and testified that, while he had learned during the trial from the prosecutor that Devins had attempted to exchange information about Coven for immunity, he had not discussed the matter with Leonard Randell, because Randell was in the hos-

---

\* Quigley admitted that, beginning before the trial and continuing to as recently as a week prior to his testimony (Tr. H. 124), he and Devins had discussed acquiring a title company in which Devins, while not a major shareholder, would play a substantial role in the management. While Quigley would not admit that Devins would be indispensable to the success of the venture, he conceded that he would like to see him available as he was a "rather astute" businessman. (Tr. H. 129).

pital suffering from a heart attack. (Tr. H. 328-31). The only person he might have mentioned this matter to was one Andrew Palato, but he was uncertain that he had even spoken to him about the matter. (Tr. H. 331).

Coven also categorically denied that he knew anything of Devins' treachery until the instant motion for a new trial had been made. However, Coven's testimony shed some light on how Devins had arrived at the decision to involve Randell in his fictitious claim. Coven testified that, before the trial began, he had had dinner with Leonard Randell and his wife at which time Randell warned him to watch out for Devins, because he would stop at nothing to save himself. Coven later mentioned these statements to Devins, which he denied, and Coven at the time chalked the warning up to bad feelings between Devins and Randell.

In light of all of this—which plainly showed Devins' claim to be an outright fabrication—it was not surprising that Judge Gagliardi gave the claim the back of the hand by simply finding that since Devins retained Coven for the trial, knowing full well that he had earlier attempted to inform on him, he made a knowing choice of counsel about which he could not now be heard to complain. Cf. *United States v. Sperling*, 506 F.2d 1323, 1337 n.19 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States ex rel. Testamark v. Vincent*, supra; *United States ex rel. Davis v. McMann*, 386 F.2d 611, 618-19 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968).

**POINT II**

**The Court's evidentiary rulings and the prosecutor's conduct of the trial were entirely proper.**

**A. The admission of the evidence concerning Devins' attempt to arrange another SBA loan for John Ferguson and the Court's later striking of that evidence resulted in no prejudice.**

Devins claims that the testimony of John Ferguson, another Vietnam veteran, concerning Devins' attempt to involve him in a deal which was virtually identified to the RBG loan, even though later stricken by Judge Gagliardi, was so prejudicial that a mistrial should have been granted. This claim is patently frivolous for three reasons: (1) only because of a misconception of law did Judge Gagliardi rule that the testimony should be stricken and, therefore, the striking of the testimony provided Devins with more than he was entitled to; (2) in any event, striking the testimony adequately protected Devins against any conceivable prejudice; and (3) Devins failure to move for a mistrial after the testimony was stricken precludes any claim of error on appeal.

One of the objects of the conspiracy with which Devins was charged was to defraud the Government by obtaining fraudulent SBA loans. The Government's theory of the case—ultimately accepted by the jury—was that Devins' scheme was to dupe impecunious veterans into acting as front men and then to have the veteran assume responsibility for repaying the loans. Once the proceeds of the loans were received, Devins and his cohorts would, through various financial arrangements, receive the bulk of the proceeds and abscond, leaving the veteran — virtually judgment proof — to repay a loan to the Government with phantom assets.

There was testimony adduced at trial that Devins had bragged to Guy Runyon that, "If you can get me a vet, why, I could get an SBA loan," and that he had explained to Nicholas Siviglia that Grosvalet was merely a "front man" or a "pawn". This testimony was, of course, clearly relevant to prove both Devins' membership in the conspiracy and his unlawful intent. To further substantiate that Devins was prepared to simply seek out veterans willy-nilly to obtain loans, the Government called to the stand Ferguson, a Vietnam-war Navy veteran.\*

Ferguson testified that he had first been introduced to Devins by Claude Hill in June of 1973, after Hill had explained that Devins had a money-making proposition. When Devins asked Ferguson if he was interested in making money, Ferguson responded that he was. Devins then explained that he would get Ferguson an SBA loan and set him up in the insurance business. Ferguson was to receive \$5,000 for getting the loan, in addition to three or four hundred dollars a week in salary. Devins also told him that he would process the loan but that Ferguson's name would appear on it. However, Ferguson refused to agree when he learned that Devins would not put up any collateral for the loan. (Tr. 813-27).

The trial judge initially permitted the introduction of this testimony and properly instructed the jury that the testimony was being offered to prove a common scheme or artifice, but not as direct proof of the offenses charged in the indictment. (Tr. 825). The Court, however, on the Monday following the offer of this proof, reversed its position and decided to strike the testimony, holding that since there had been no "crime" committed by

---

\* The Government was not permitted to elicit from Siviglia Devins' master plan to obtain close to \$500,000 in capital through several veterans' SBA loans. (Tr. 1142-43).

Devins in connection with the proposal to obtain an SBA loan for Ferguson, the testimony was not of sufficient relevance to be admitted. (Tr. 962-67).

The District Judge was, we respectfully submit, in error when he focused on the fact that Devins' conduct had not reached the point of a completed crime and struck this testimony. As this Court made clear in *United States v. Catalano*, 491 F.2d 268, 273-74 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974), the fact that relevant similar acts of a defendant do not constitute a crime renders the proof more easily admissible, since the potential prejudice is largely eliminated. Moreover, this evidence was not being offered to prove that Devins had completed another crime; rather, it was offered to prove that Devins was actively soliciting veterans who were virtual strangers to obtain loans for businesses in which they had not the slightest experience. In light of these facts, the striking of this testimony, gave Devins far more than he was entitled to.

In any event, the striking of this testimony fully protected Devins against any prejudice. It is well settled that when inadmissible evidence has been heard by the jurors, the error is ordinarily to be cured by the Court striking the testimony and instructing them that the evidence is to be entirely disregarded; only when the evidence is so prejudicial that it is unlikely that the jurors will be capable of erasing the matter from their consciousness is a mistrial mandated. See *United States v. Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Plante*, 472 F.2d 829, 830 (1st Cir.), *cert. denied*, 411 U.S. 950 (1973); *United States v. Bergman*, 354 F.2d 931, 935 (2d Cir. 1966); *United States v. Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States v. Tomaiolo*, 249 F.2d 683, 695 (2d Cir. 1957); *United States v. Giallo*, 206 F.2d 207,

210 (2d Cir. 1953), *aff'd*, 346 U.S. 929 (1954). Since the trial judge is in the best position to assess the impact that the inadmissible evidence has had on the jury, he is given broad discretion to determine whether a mistrial is necessary, and his decision will only be reversed on appeal if he has clearly abused that broad discretion. *United States v. Calabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States v. Marshall*, 458 F.2d 446, 451 (2d Cir. 1972); *United States v. Kompinski*, 373 F.2d 429, 432 (2d Cir. 1967).

Here, it is crystal clear that the Court did not err in finding that the defendant's rights would be fully protected by striking the testimony. The Court correctly observed that, because the testimony had not concerned a crime, it was inconceivable that it would affect the jury, particularly after proper instructions to disregard the testimony were given. (Tr. 962, 965, 1128).<sup>\*</sup> And, in any event, this conclusion was not clearly erroneous.

Finally, after Judge Gagliardi struck this testimony, no prompt motion was made for a mistrial on the ground that Devins had suffered incurable prejudice. In that circumstance, he cannot now argue for reversal based on the effect of this testimony on the jury. Since the defendant was content below to rest on the striking of the testimony and the Court's curative instructions, "[h]e could not thus risk the verdict of the jury and if it turned out to be adverse, raise the question that the error was

---

<sup>\*</sup> Devins rather insultingly implies that Judge Gagliardi's finding that any error was harmless was an attempt to "insulate an admitted error from appellate review simply by stating on the record that he did not 'feel' the error had any effect on the jury." (Br. at 61). We respectfully submit that the trial judge acted responsibly in making this finding and was not, as Devins implies, motivated by any ulterior motive.

not cured on appeal." *Ladakis v. United States*, 283 F.2d 141, 143 (10th Cir. 1960); see *United States v. Calles*, 482 F.2d 1155, 1162 (5th Cir. 1973); *Remus v. United States*, 291 F. 501, 510 (6th Cir. 1923), *cert. denied*, 263 U.S. 717 (1924).

**B. The Court was correct in finding that Siviglia's testimony concerning Devins' involvement in the distribution of pornographic cassettes did not prejudice the defendant.**

Devins argues that he was irreparably prejudiced because testimony concerning pornographic cassettes was heard by the jury when the Government attempted to elicit from Siviglia testimony concerning Devins' business relationship with Grosberg and Kirtman. The testimony was promptly stricken upon the objection of counsel, and it is abundantly clear from the record, as the court found, that Devins was not prejudiced.

During Nicholas Siviglia's testimony, the Government inquired what Grosvalet had told Siviglia about his business dealings with Devins and his partners, Kirtman and Grosberg, during the summer of 1973. Siviglia replied, in corroboration of Grosvalet, that Grosvalet told him that he was thinking about backing out of the attempt to obtain an SBA loan and that he was concerned about the fact that he was expected to distribute pornographic cassette films. (Tr. 1193-94). At this point, defense counsel successfully objected and this passing reference to pornographic films was promptly stricken.

Two pages later in the transcript, the prosecutor, now asking about Siviglia's own relationship with Devins, Kirtman and Grosberg, in order to establish that Devins, Kirtman and Grosberg had a regular business relationship (see Tr. 1194), asked what Devins had said at a meeting in the summer of 1973. Unexpectedly, Siviglia

began his reply by mentioning that Devins had been "working out the details of the cassette distribution with Mr. Kirtman." (Tr. 1193). The Court again promptly struck this testimony.

After Siviglia's direct examination had come to an end, the prosecutor explained to the Court that he had not intended to elicit testimony concerning the nature of the cassettes, but had only sought to establish Devins' ongoing business relationship with Grosberg and Kirtman. (Tr. 1196). Judge Gagliardi, who had had an opportunity to observe the prosecutor's conduct throughout this trial and a related trial,\* then stated that, though the matter was not prejudicial, "it shouldn't have been brought out but I can't reprimand you as you didn't do it intentionally." \*\* (Tr. 1197). The Court then again emphasized that in his view this passing reference to pornographic cassettes was nonprejudicial, particularly since there had been prior testimony that, when Grosvalet first met Devins, Grosvalet was preparing a soundtrack for a pornographic movie. (Tr. 1197-98).

While the Court was clearly correct at the time in finding that no prejudice had resulted, the insubstantiality of this claim became even more evident as the trial progressed. For during the defense case, Grosberg testified that Devins had discussed a merger with Grosberg and Kirtman, who owned the pornographic film studio at which Grosvalet had been working on the soundtrack for a pornographic film. (Tr. 190, 1633-34).

---

\* See *United States v. Hero*, Dkt. No. 75-1396, *aff'd without opinion*. (March 5, 1976).

\*\* A few lines later the Court stated, "I think it is quite serious and I believe it is intentional." (Tr. 1197). While on the cold record this appears to be an inconsistency, the Judge was plainly, at that point, referring to his view of the witness' conduct, not the prosecutor's.

In light of the fact that this incident was a brief one in a long trial and in light of overwhelming evidence of guilt, Judge Gagliardi was surely correct in determining that the striking of this testimony fully protected Devins against any resulting prejudice. Cf. *United States v. Bynum*, *supra*, 485 F.2d at 503; *United States v. Stromberg*, *supra*, 268 F.2d at 259; *Tallo v. United States*, 344 F.2d 467, 468-69 (1st Cir. 1965).

**C. The prosecutor acted properly in correcting Grosvalet's mistaken testimony by calling Siviglia to the stand to testify that his handwriting, not Devins', appeared on certain draft documents.**

Devins argues that the prosecutor intentionally permitted Grosvalet and Sylvie Kristoff to commit perjury without promptly bringing this matter to the Court's attention. This claim is based on Grosvalet's testimony that Devins' handwriting appeared on certain drafts of documents later presented to the SBA in support of the RBG loan and Kristoff's testimony that she saw Devins "make our forms for the balance sheets, the prospective balance sheets . . ." (Tr. 996). Devins' claim is patently frivolous. After learning that Nicholas Siviglia's handwriting, not Devins', appeared on the draft documents, the Government called Siviglia to the stand and he so testified. The Government was not, as Devins argues, bound to label Grosvalet and Kristoff as liars, when it was manifest from the record that they had made a perfectly understandable error. Moreover, by proceeding as it did, the Government did not prejudice Devins in the slightest.

We do not for a moment quarrel with the salutary principles established by *Giglio v. United States*, 405 U.S. 150, 153 (1972) and *Napue v. Illinois*, 360 U.S. 264, 269

(1959), that the Government should never deliberately permit its witnesses to testify falsely or allow false testimony to go uncorrected. What we do quarrel with is Devins' patent attempts to distort the record to make it appear that the prosecutor permitted perjured testimony to affect this trial. Nothing could be further from the truth.

At trial on April 8, 1975, Grosvalet identified the various documents which were given him by Devins to submit to the SBA. These documents included the loan application and its supporting financial and descriptive papers. (GX 6; Tr. 230-84). Grosvalet also identified the draft copies of many of the documents which he had obtained from Devins' office. He then testified that the writing on the application form (GX 1) which was submitted to SBA *appeared* to be in Devins' handwriting (Tr. 230); that, with respect to a draft of the application form (GX 1A), he had seen Devins fill out a form (Tr. 231); that he first saw the draft of his personal financial statement (GX 2A) in Devins' office (Tr. 202, 236) and the handwriting *appeared* to be Devins' (Tr. 238); and that as to the draft of the "history" of his business (GX 3A), the handwriting *appeared* to be Devins'. (Tr. 243-44).

Likewise, Grosvalet identified the drafts of the "use of proceeds", balance sheet and projection (GX 6A, 8A and 9A) as the ones he had seen in Devins' office. (Tr. 287). He said he *believed* he saw Devins working on the balance sheet (Tr. 288), but did not testify it was in Devins' handwriting. He further testified that he was unable to honestly say (Tr. 292) whether the projection sheet was the precise paper he took to the SBA, with the result that it was not received into evidence. (Tr. 290-92).

After his direct testimony, Grosvalet was cross-examined extensively for over two days. During that examination, it was perfectly clear that his identification

of the documents was tentative and based on a brief familiarity with Devins' handwriting. For example, when shown draft documents (GX 1A, 2A, 3A) and asked if he saw Devins fill out these forms, he replied:

"I saw Mr. Devins fill out certain forms." \* \* \*

"I said I recognized Mr. Devins' handwriting and that I did see Mr. Devins fill out certain forms."

\* \* \* "*Looks to me like Mr. Devins' handwriting.*"

\* \* \* "*To the best of my knowledge, yes.*" (Tr. 546-47) (emphasis supplied).\*

It was readily apparent to the jury, as it was to the defense, that Grosvalet had seen Devins fill out certain forms (although he was not certain which they were) and that his identification of certain documents, as being in Devins' hand, was based on a brief familiarity with his handwriting. The equivocal nature of his testimony, to

---

\* When asked if he was present when Devins filled out GX-1A, 2A, 3A he replied:

"I was present when Devins filled out documents" \* \* \*

"*Those could be the documents he filled out that I saw*" \* \* \*

"I saw Mr. Devins fill out a sheet, a document that was—  
what was it called? I *believe* it was a U of Proceeds document. There was a lot of figures on it. I saw him write out, copying from what I had written, a personal history statement" \* \* \* "I saw him fill out documents" \* \* \* "I *believe* I said it was the Use of Proceeds. I *don't know* if it was a Financial Statement or what." (Tr. 547-49).

In answer to the question whether his testimony was that he recognized GX 2A to be in Devins' handwriting Grosvalet replied, "That is correct." But when pressed further he said "It could be this one, I said I was with Mr. Devins when he filled out certain documents. What more can I possibly say? I recognize the document. I recognize Mr. Devins' handwriting." (Tr. 549). Grosvalet later testified that he believed the original of GX-2A was handed to him by Devins. (Tr. 552). Later he testified that he had seen Devins make out various documents and that one was possibly a balance sheet or projection sheet. (Tr. 682).

the point at times of self-contradiction, was totally inconsistent with any claim that he was deliberately testifying falsely; for if he was going to perjure himself, he would have been far more convincing about the origin of the documents than he was. \*

Thereafter, on April 15, 1975 Nicholas Siviglia was called to testify as a Government witness. He testified that Devins had prepared the financial statements for the RBG loan on a single 14-column work sheet and that he, Siviglia, was assigned to transpose the figures on to draft statements for the SBA application. Siviglia further testified that all of the drafts (GX 1A, 2A, 3A, 5A, 6A, 8A and 9A) had been prepared by him, not Devins. (Tr. 1160-62).

In order to place the testimony of both Grosvalet and Siviglia in the proper perspective for the jury, the Government then offered for comparison a sample of Devins' known handwriting, a restaurant check which bore Devins' notes in blue felt-tipped pen. (DX M). The difficulty which a lay person would have distinguishing between the blue felt-tipped pen writing on the draft documents (GX 1A, 2A, 3A, 5A, 6A, 8A, 9A), concededly prepared by Siviglia, and Devins handwriting (DX M and A13) was conceded even by the defense handwriting expert. (Tr. 1988).

Based on all of this, Judge Gagliardi, who had, of course, observed the witnesses and heard all the evidence, found, during the post-trial hearing, that the jury could not have been misled as to whose handwriting appeared on the loan documents:

"The Court: I don't see that it is a big deal anyway. Siviglia got out, there is no question that he admitted that he had prepared the application, the jury wasn't confused about it in any way. I can see no way that that would affect the verdict of the jury in this case . . ." (Tr. H. 214).

In the face of all of this, Devins nevertheless argues that, though the prosecutor called Siviglia to the stand, he should have alerted the Court to Siviglia's proposed testimony as soon as he learned that it would contradict Grosvalet, sometime after Grosvalet had identified the documents during his direct examination. (Br. at 75). Devins claims that he was prejudiced, because the jury may ultimately have believed Grosvalet's testimony, not Siviglia's, and Grosvalet's testimony permitted some of the duplicate forms to be "prematurely" admitted into evidence. (Br. at 76).

While we believe that the claims of prejudice are palpably frivolous since (1) it was as plain to the jury, as it was to the court and counsel, that Grosvalet had been mistaken and that Siviglia's handwriting was on the documents, and (2) the "premature" admission of these documents could not have affected the jury's verdict in the slightest,\* there is also not the slightest basis to Devins' claim that the prosecutor should have acted other than he did. When the prosecutor became aware that Siviglia had authored the documents, Grosvalet had already mistakenly identified the documents as written by Devins. The prosecutor was not bound at that point to brand Grosvalet as a liar when it was perfectly clear that Grosvalet had made an honest mistake.

Nor was the defense precluded from again examining Grosvalet after Siviglia testified. In fact, Grosvalet was

---

\* Even if Grosvalet had not testified as to the authorship of GX 1A, 2A and 3A, his other testimony was unequivocal that he had seen each in Devins' office. (Tr. 230, 236, 243). Taken with the fact that these documents were drafts of the originals given by Devins to Grosvalet to take to the SBA (Tr. 219-20, 243), an adequate foundation existed to circumstantially connect them to Devins through Grosvalet's testimony. *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975). Accordingly, the documents would have been admissible at the time of Grosvalet's testimony, and their entrance into the case was not, therefore, in any event, "premature."

called as a defense witness, and it is instructive that no inquiry was again made of Grosvalet concerning the authorship of the documents.

The course chosen by the prosecutor, to let cross-examination take its normal course and then call Siviglia to clarify the matter, had the effect of putting all the relevant facts before the jury and resulted in absolutely no prejudice to Devins. Compare *United States v. Acosta*, 526 F.2d 670, 674 (5th Cir. 1976).

- D. The prosecutor's notes of his interview with Grosvalet were not producible under 18 U.S.C. § 3500 or *Brady v. Maryland*, and, in any event, the District Court correctly determined that there was no deliberate suppression of this material and that the material, if turned over, could not have induced a reasonable doubt.**

Devins argues that the District Court erroneously refused to order the Government to turn over interview notes and witness sheets of its witness Grosvalet. He argues that this material should have been produced (1) pursuant to 18 U.S.C. § 3500, because it was "adopted" by Grosvalet or because it was a substantially verbatim written statement, or (2) pursuant to the principles of *Brady v. Maryland*, 373 U.S. 93 (1963), because exculpatory of the defendant. This claim is meritless.

During Grosvalet's cross-examination, he testified that he had been interviewed by the prosecutor on three occasions during which the prosecutor had taken notes. (Tr. 430-32). Based on this plainly insufficient showing, see *United States v. Smaldone*, 484 F.2d 311, 317 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974),\* defense coun-

---

\* Compare *Goldberg v. United States*, 44 U.S.L.W. 4424, 4426, — U.S. — (March 30, 1976).

sel argued unsuccessfully that the Government was obliged to turn over its notes of interviews. (See Tr. 422-25, 432, 461, 464). The defense made no inquiry at all concerning any formal "adoption" by Grosvalet of the notes, arguing instead that prosecutors are in all cases obliged to turn over all notes of witness interviews. (Tr. 424-25).<sup>\*</sup> The Court did, however, agree to make an *in camera* inspection of the prosecutor's investigative notes and witness sheets (Tr. 1223), and this material was handed up to the Court for inspection. (Tr. 1328).<sup>\*\*</sup>

---

\* Devins points to questioning of another witness, Sylvie Kristoff, and indicates that notes of her interviews should have been turned over because she testified that the prosecutor had on occasion repeated the essence of what she had said to him to see if he had gotten it down correctly. (See Tr. 1073). What Devins conveniently overlooks is the prosecutor's earlier questioning:

"BY MR. WILSON [the Assistant United States Attorney]:

Q. Miss Kristoff, did I ever ask you to read and adopt as your testimony notes that I took?

MR. COVEN: I object, your honor.

THE COURT: No, I will permit it.

Q. Did you ever adopt as your testimony or statement any of notes? A. No.

MR. WILSON: No further questions. I decline to produce any of my work product.

THE COURT: Yes.

BY MR. COVEN:

Q. Miss Kristoff, what does that statement adopt testimony mean to you? What did it mean to you? Mr. Wilson asked you did you adopt the testimony. Do you understand, Miss Kristoff? A. I wasn't obligated—

MR. COVEN: I withdraw the question, Judge." (Tr. 1016).

\*\* Devins, parsing certain language of the District Judge at the post-trial hearing, argues that the Court never conducted an *in camera* inspection of the material. (Br. at 78 n.65). We find it hard to believe that the Court would require the prosecutor to deliver the material to the Court and then not make an inspection.

The Court also ordered that the material be sealed and made available for appeal.\*

At the post-trial hearing, Judge Gagliardi permitted Devins to further explore the 3500 material issue. Grosvalet was called to the stand and testified concerning his own witness sheet:

"Q. Did Mr. Wilson [the prosecutor] write out questions and then ask you the questions and then write out the answers that you gave to those questions? A. Yes.

Q. And later showed you the written questions and written answers and ask you whether the answers that were written out were your answers? A. Yes.

Q. Did you verify most of the answers? A. Yes.

Q. With respect to those answers that you did not verify, did you have a discussion with Mr. Wilson about those answers? A. Yes.

\* \* \* \* \*

Q. On occasion did Mr. Wilson change the written answer that he had written out after having a discussion with you? A. I know that he wrote things that were my own words; and in reading back the questions about some of the answers, and in discussing them, we came to a final answer that was usually, if not all the time, my answer; the way that I had known it to be.

Q. In other words, your own words? A. Right." (Tr. H. 202-03).

\* \* \* \* \*

---

\* During the trial the defense also claimed that it was entitled to the interview notes and witness sheets of Sylvie Kristoff and Nicholas Siviglia. This claim appears to have been abandoned on appeal.

He then further testified on cross-examination:

"Q. On that list of questions, did you see full verbatim answers, or did you see one word notes of what the answers should be? A. Most of them I guess were little notes.

Q. Did you also see notes like interviews re Exhibit 10, mark Exhibit 10, and then introduce Exhibit 10, show Exhibit 16? Did you see those little notes? A. Yes.

Q. It was a list of questions with one or two words along with instructions if you want to put exhibits in? A. Yes, I recall.

Q. And that was the 12 or so pages—in fact I think it is 18—that you spoke of in answer to Mr. Brodsky's questions and in your affidavit, is that correct? A. Correct.

Q. Is there anything in that document that you were asked to adopt and say, "This is my statement, this is what I am going to say," or was it as an aid to help you prepare? A. Nothing told me what to say, if that's what you are inferring.

\* \* \* \* \*

The Court: These 12 or 18 pages, those were not your answers verbatim, answers word for word as to what you were going to testify?

The Witness: Not verbatim.

The Court: Was it a condensed version in any respect, or was it just a notation that Mr. Wilson used—

The Witness: There were some that were notations and there were some that were straight answers, you know, verbatim on some of them. They were kind of short, I believe. If the sentence was only a few words, then I think I believe he wrote them out verbatim. Otherwise, for the most part they were notes.

The Court: You say the most part were just his notes of what he anticipated your answers would be?

The Witness: Not anticipating what but actually what I did say to him."

Finally, this subject was again touched upon during re-direct examination:

"The Court: Incidentally, did you testify substantially in accordance with the answers that you gave him on the stand as you recall it?

The Witness: As he spoke the questions to me, yes. I believe that they were similar to what I had said.

The Court: Your answers, and as far as you know they were truthful when you gave them?

The Witness: I still believe they are." (H. Tr. 221-24).

\* \* \* \* \*

"Q. You said you wrote—Mr. Wilson wrote some things. if I may quote back to you what I believe you said on direct examination, wrote some things which were in your own words. I believe that is substantially the same as what you told his Honor a moment ago.

The Court: Yes, it was a short three or four words. Is that correct?

The Witness: Correct." (Tr. H. 226).

Defense counsel then requested that the Court examine the notes, but the Court declined to do so after the prosecutor pointed out that this material had been turned over to the Court for several hours for inspection during the trial. The Court also noted that the witness had affirmed that his trial testimony was not different from the witness sheets. (Tr. H. 226). Defense counsel did not then renew his request for an *in camera* inspection by Judge Gagliardi.

At the conclusion of the hearing, Judge Gagliardi ruled that only by "an extreme stretch of the imagination" could the Grosvalet notes be viewed as 3500 material, and that even if they were

"there was no deliberate withholding of it from the defense and . . . the turning of it over to the defense would not have resulted in a different verdict from this jury nor could it have conceivably led to a different result from this jury." (App. "D", at 26).

These conclusions of the trial judge are plainly correct.

The procedure followed by the prosecutor in interviewing Grosvalet, as developed at the post-trial hearing, was not an uncommon one. The witness was interviewed on two or three occasions before he testified. On at least one occasion, the prosecutor showed the witness a previously prepared witness sheet for his scrutiny. The prosecutor then questioned Grosvalet from the witness sheet, and Grosvalet responded. The responses were then informally discussed, and, as the relevant facts became clearer to both the witness and the prosecutor, the responses—for the most part brief notes, not verbatim answers—were modified. (Tr. H. 219-21, 223).

Devins, whose burden it was to establish that this material was 3500 material, see *United States v. Smaldone, supra*, 484 F.2d at 317, did not, and we submit could not, demonstrate that under this procedure it could fairly be said that Grosvalet had formally adopted these witness sheets as his own statements. In support of his contention that the statements were adopted, Devin relies upon the Supreme Court's recent decision in *Goldberg v. United States*, 44 U.S.L.W. 4424, — U.S. — (March 30, 1976), where the Court held that statements of witnesses prepared by prosecutors, otherwise producible pursuant to 18 U.S.C. § 3500(e), could not be withheld on the ground that they were an attorney's "work product."

The significance of *Goldberg*, however, is not in the support it provides for Devins, but rather in the support it provides to the Government. Because the Court in *Goldberg* determined that a remand was necessary for further factual findings, the discussion of what would constitute—or more accurately what would not constitute—an “adoption” of a prosecutor’s notes for purposes of § 3500 (e) (1) was plainly dicta and therefore relegated to a footnote. 44 U.S.L.W. 4429 n.19. Mr. Justice Brennan, the author of the Court’s opinion, did note, however, that “[e]very witness interview will, of course, involve conversation between the lawyer and the witness, and the lawyer will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said.” *Id.* He added that “[s]uch discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer’s notes within § 3500(e)(1).” While the Court noted that reading back the notes or permitting the witness to read them would be necessary for a finding of an adoption, the Court also made it clear that these necessary factors would not be sufficient in and of themselves to support a finding of adoption.\*

The concurring opinions of Mr. Justice Powell and Mr. Justice Stevens in *Goldberg* shed far more light on what factors ought to be present before a witness can be fairly subjected to impeachment by a Government attorney’s notes. Justice Stevens in a concurring opinion joined by Mr. Justice Stewart stated that

---

\* In ordering its remand, the Court stated, “it will be necessary to determine whether the prosecutor’s notes were actually read back to Newman [the witness] and whether he adopted or approved them.” 44 U.S.L.W. at 4429. Quite plainly, the Court believed that evidence of a rereading of the notes would be insufficient to support a finding of an adoption.

"more than relevance to the testimony and approval by the witness is necessary to make a writing a Jencks Act statement. It must first of all be the kind of factual narrative by the witness that is useable for impeachment." *Id.* at 4434.

He continued:

"General testimony that some of the notes taken by the prosecutor during a lengthy interrogation were read back to the witness, and that the witness sometimes assented to the prosecutor's version of what he said, would not justify a finding of approval of any particular note. *Fairness to the witness demands a much more strict test of approval before he may be confronted with assertedly prior inconsistent statements.*" *Id.* (emphasis supplied).

Mr. Justice Stevens concluded that "any determination that a portion of the prosecutor's notes is producible must be supported by a finding of *unambiguous and specific approval by the witness.*" *Id.* at 4435 (footnote omitted) (emphasis supplied).

Mr. Justice Powell, in a concurring opinion joined by The Chief Justice, stated that:

"such a finding depends upon the witness' having approved specific notes *with the knowledge that he is formalizing a statement upon which he may be cross-examined.* Nothing less is sufficiently 'unambiguous' in this context." *Id.* at 4432 (emphasis supplied).

Mr. Justice Powell went on to discuss the unfortunate consequences that could result at trial if fragmentary notes of a prosecutor not fully adopted or approved by a witness were given to defense counsel:

"As every trial lawyer knows, the testimony given in court rarely conforms precisely to what the wit-

ness has said prior to trial in interviews with counsel. This is true in part because lengthy exploratory interviews often are required to refresh the witness' memory sufficiently to allow him to reconstruct events that may have transpired long before. Such interviews and the related note-taking serve to distill the essence of what the witness knows and to identify the relevant." *Id.* at 4433 (footnote omitted).

He continued, explaining the great injustice that could be done to a witness by inferring adoption from only "general assent":

"The Jencks Act was not designed to allow a witness to be impeached by every arguable variation between his trial testimony and notes written by the prosecutor and casually approved by the witness during this process, because the witness may have expressed only general assent to the prosecutor's understanding without any consciousness that he had to be ready to stand by every word in or nuance conveyed by the prosecutor's notes. *If notes are producible on a showing of less than knowing adoption as a formal statement, honest and reliable witnesses will be postured wrongly before the jury as having made inconsistent statements.*" *Id.* (emphasis supplied).

Applying to the facts of this case, the views of these four concurring Justices—the only members of the Court to grapple with all of the criteria necessary to support a finding of "adoption"—, it is plain that no adoption has occurred. Grosvalet was never asked to sign this statement, nor was it ever suggested that he would be obliged to stand by every word and nuance conveyed in the brief and sometimes elliptical notes of the prosecutor. In that circumstance, it would be fundamentally unfair, and likely misleading to the jury, to provide these notes to

defense counsel for use in the impeachment of a witness who had never formally adopted the statements.\*

But even assuming *arguendo* that the witness sheets were producible under § 3500, Devins has suffered no prejudice. It is well-settled that the legal standard to be applied in determining whether a new trial is warranted when the Government has failed to produce 3500 material depends on whether the suppression was deliberate or inadvertent:

"If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable too the defense. But if the government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States v. Hilton*, 521 F.2d 164, 166 (2d Cir. 1975) (footnote omitted).

Here, the Government turned over eight items of 3500 material relating to Grosvalet's testimony and with-

---

\* Devins also lamely argues that, even if there was not an adoption of the witness sheet for purposes of 18 U.S.C. § 3500 (e)(1), the notes constituted "a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement," within the meaning of § 3500(e)(2). Judge Gagliardi's finding that the notes were not "substantially verbatim" was fully supported by Grosvalet's testimony. Moreover, as Mr. Justice Powell noted in *Goldberg*, "[c]ounsel rarely take down verbatim what witnesses say in these preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of subsection (e)(2) very infrequently." 44 U.S.L.W. at 4431 n.9.

held the witness sheets and investigative notes only because of an interpretation of the Jencks Act with which the District Court agreed. In light of these facts and the fact that the material was delivered to the Court for *in camera* inspection, it cannot seriously be argued that the Government has engaged in any culpable or deliberate suppression of evidence.

Moreover, as an examination of the material will confirm, Judge Gagliardi correctly found that, based on Grosvalet's testimony and the overwhelming evidence of Devins' guilt, there was not a significant chance that the material could have induced a reasonable doubt in the minds of the jurors. (App. "D", at 26). And most certainly it could not be said that Judge Gagliardi's determination was unsupported by evidence and clearly erroneous. See *United States v. Parness*, Dkt. No. 75-1369 (2d Cir., Jan. 12, 1976), slip op. 1463, 1465; *United States v. Miranda*, 526 F.2d 1319, 1324-29 (2d Cir. 1975); *United States v. Zane*, 507 F.2d 346, 347-8 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. DeSapio*, 456 F.2d 644, 647-48 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States v. Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).\*

---

\* Finally, Devins claims that the prosecutor's notes should have been furnished pursuant to *Brady v. Maryland*, *supra*, because they may have contained Grosvalet's alleged statements to the prosecutor that he did not know for sure who prepared the loan application and that Devins had told him not to give any money to Hill or King until he had received the films. (Br. at 84). An inspection of the prosecutor's notes will reveal the absence of any such notations.

### POINT III

**The Court did not err in refusing to compel King to testify.**

Toward the end of the second week of trial co-defendant King was severed after pleading guilty to an Information charging him with failing to file a corporate tax return on behalf of National Telepax for the fiscal year ending May 31, 1974, in violation of Title 26, United States Code, Section 7203. Thereafter, the defense subpoenaed King to testify, but King, through his attorney, advised the Court that if King were called to the stand, he would assert his Fifth Amendment privilege. The Court, over defense counsel's insistence that King be compelled to testify, refused to order King to take the stand. Devins claims that the Court erred in not compelling King to testify, since he had lost his right to assert his Fifth Amendment privilege by his plea and, in any event, should have been given use immunity by the Government. These arguments are frivolous.

Devins correctly concedes that his Sixth Amendment right of compulsory process must give way to any legitimate reliance by King on his privilege against self-incrimination. (Br. at 88). However, he argues that King's guilty plea nullified any privilege he might have had concerning the facts underlying his plea to the Information. In advancing this argument Devins conveniently overlooks a number of critical facts.

First, the Court was advised by the Government that, although the Government had accepted a plea to the Information, there was an ongoing investigation by the Internal Revenue Service into King's personal and corporate tax situation. (Tr. 1667). In that circumstance, Judge Gagliardi correctly observed that the determination

whether or not to assert the privilege was to be made by the witness and not the Court (Tr. 1669<sup>1</sup>), since it was not "perfectly clear" that the answers to be propounded concerning the RBG deal and others "could not possibly have tended to incriminate him." *Hoffman v. United States*, 341 U.S. 479, 488 (1951); *United States v. Frascone*, 299 F.2d 824, 827 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962).

Second, at the time King was subpoenaed to testify, there remained a possibility that he would again be prosecuted for the SBA charges in the instant case. His arrangement with the Government was that, after his sentence on the tax charges, the SBA charges would be *nolle prossed*. (See Tr. 1667).<sup>\*</sup> Since his plea of guilty to the tax charges had not resulted in a final conviction, Judge Gagliardi correctly ruled that King's testimony might at a later point be used against him at a trial on the very charges contained in the instant indictment. (Tr. 1667). See *United States v. Domenech*, 476 F.2d 1229, 1231 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973).

Third, since King had not yet been sentenced on the tax charges, he may well have retained the right to assert his Fifth Amendment privilege with respect to questions about those very charges. See *United States v. Wilson*, 488 F.2d 1231, 1233 n.3 (2d Cir.), *rev'd on other grounds*, 421 U.S. 309 (1975); *United States v. Domenech*, *supra*, 476 F.2d at 1231.

Devins second contention that the Government was obliged to grant him use immunity flies in the face of settled law.<sup>\*\*</sup> The Government was not required to grant

---

<sup>\*</sup> A *nolle prosequi* was ultimately filed on September 4, 1975 as to King on indictment 74 Cr. 1052.

<sup>\*\*</sup> The sole authority on which Devins premises this argument is a 1972 law review article. (Br. at 90-91).

immunity to King so that he could be called as Devins' witness, *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), and the Court lacked the power to compel the Government to do so. *United States v. Bautista*, 509 F.2d 675, 678 (9th Cir.), cert. denied, sub nom *Monsivais v. United States*, 421 U.S. 976 (1975); *United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973); *United States v. Morrison*, 365 F.2d 521, 524 (D.C. Cir. 1966); *United States ex rel. Tatman v. Anderson*, 391 F. Supp. 68, 72 (D. Del. 1975).\*

Finally, no showing of prejudice can be made. Devins argues that King's plea of guilty to failing to file a tax return for National Telepix for the tax year ending on May 31, 1974 demonstrated that King would have testified that National Telepix had been in existence for much of the prior year (Br. at 91). The plea demonstrated nothing of the kind. The plea was nothing more than an admission that King had received a check for \$30,000 from Grosvalet on behalf of National Telepix on May 15, 1974—a fact clearly established by prior testimony. (See Minutes of Plea of Max King, April 17, 1975, at 6). The plea most certainly did not prove or even suggest that National Telepix had been doing any business prior to May 15, 1974.

---

\*It is naive to say the least for Devins to argue that granting use immunity to King would have "fully protected" the Government's interests. (Br. at 92). Under the Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), after a witness has been granted use immunity, the Government, in a later prosecution of the witness, bears the burden not simply of negating taint, but of affirmatively proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* 460. This onerous burden will on occasion be nearly impossible to meet, even where the Government believes its case is untainted. See *United States v. Kurzer*, Dkt. No. 75-1437, slip op. 3219 (2d Cir., April 14, 1976).

**CONCLUSION**

**The judgment of conviction should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

GEORGE E. WILSON,  
LAWRENCE B. PEDOWITZ,  
*Assistant United States Attorneys,  
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

Alice Prokopik being duly sworn,  
deposes and says that she is employed in the office of the  
United States Attorney for the Southern District of New York.

That on the 6th day of May, 1976  
she served a copy of the within Appeal Brief  
by placing the same in a properly postpaid franked envelope  
addressed:

The Legal Aid Society  
509 United States Courthouse  
Foley Square  
New York, New York 10007  
Attention: Richard A. Greenberg, Esq.

And deponent further says that she sealed the said envelope  
and placed the same in the mail drop for mailing  
the United States Courthouse, Foley Square,  
Borough of Manhattan, City of New York.

*Alice Prokopik*

Sworn to before me this

*6th day of May 1976*

*Lynwood Hayes*

LYNWOOD HAYES  
Notary Public, State of New York  
No. 41-1720825  
Qualified in Queens County  
Cert. filed in New York County  
Commission Expires March 30, 1977